(9)

Supreme Court, U.S.
FILED
APR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1551

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER, ET AL., APPELLANTS

v.

JEFFREY MAY, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

MICHAEL CARVIN
Deputy Assistant Attorney General

ANDREW J. PINCUS
Assistant to the Solicitor General

DAVID K. FLYNN
LISA J. STARK
DENNIS J. DIMSEY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

38 pp

QUESTIONS PRESENTED

1. Whether appellants have standing to invoke this Court's appellate jurisdiction.

2. Whether a state statute that provides for a moment of silence in public school classrooms "to be used solely at the discretion of the individual student * * * for quiet and private contemplation or introspection" (N.J. Stat. Ann. § 18A:36-4 (West. Supp. 1986)) violates the Establishment Clause of the First Amendment.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	7
Argument:	
I. Appellants lack standing to maintain this appeal	8
II. The New Jersey statute does not violate the Establishment Clause	14
A. The New Jersey statute has a valid primary purpose	14
B. The statute does not have the impermissible effect of advancing or inhibiting religion, or of creating an entanglement between church and state	28
Conclusion	31

TABLE OF AUTHORITIES

Cases:

Abington School Dist. v. *Schempp*, 374 U.S. 203 (1963)	14, 16, 22, 30
Ansonia Board of Education v. *Philbrook*, No. 85-495 (Nov. 17, 1986)	2
Bender v. *Williamsport Area School Dist.*, No. 84-773 (Mar. 25, 1986)	9, 11, 12, 13
Bose Corp. v. *Consumers Union*, 466 U.S. 485 (1984)	6, 23
Bowen v. *Roy*, No. 84-780 (June 11, 1986)	2, 19
Brandon v. *Holt*, 469 U.S. 464 (1985)	10
Burke v. *Barnes*, No. 85-781 (Jan. 14, 1987)	13
Coleman v. *Miller*, 307 U.S. 433 (1939)	13
Davis v. *Preston*, 280 U.S. 406 (1930)	11
Diamond v. *Charles*, No. 84-1379 (Apr. 30, 1986)	9, 11, 12, 13

Cases—Continued: Page

Engel v. *Vitale*, 370 U.S. 421 (1962) 30
Epperson v. *Arkansas*, 393 U.S. 97 (1968) 26
Estate of Thorton v. *Caldor, Inc.*, 472 U.S. 703 (1985) 2
Everson v. *Board of Education*, 330 U.S. 1 (1947) .. 25
Field v. *Clark*, 143 U.S. 649 (1892) 12
Gillette v. *United States*, 401 U.S. 437 (1971) 19, 20, 28
Goldman v. *Weinberger*, No. 84-1097 (Mar. 25, 1986) 2
Goldwater v. *Carter*, 444 U.S. 996 (1979) 13
Hobbie v. *Unemployment Appeals Comm'n*, No. 85-993 (Feb. 25, 1987) 2, 19
Hunter v. *Underwood*, 471 U.S. 222 (1985) 26
Illinois ex rel. McCollum v. *Board of Education*, 333 U.S. 203 (1948) 21
Kentucky v. *Graham*, 473 U.S. 159 (1985) 10
Larson v. *Valente*, 456 U.S. 228 (1982) 28
Lemon v. *Kurtzman*, 403 U.S. 602 (1971) ..2, 3, 4, 8, 14, 30
Lynch v. *Donnelly*, 465 U.S. 668 (1984) 2, 15, 18, 19, 28
Marsh v. *Chambers*, 463 U.S. 783 (1983) 2, 19, 20, 30
McDaniel v. *Paty*, 435 U.S. 618 (1978) 19
McGowan v. *Maryland*, 366 U.S. 420 (1961) 17, 20, 25
McRae v. *Mathews*, 421 F. Supp. 533 (E.D.N.Y. 1976), rev'd, 448 U.S. 297 (1980) 13
Miller v. *Fenton*, No. 84-5786 (Dec. 3, 1985) 23
Monell v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978) 9
Mueller v. *Allen*, 463 U.S. 388 (1983) 16, 20, 22
NLRB v. *Catholic Bishop*, 440 U.S. 490 (1979) 20
Princeton University v. *Schmid*, 455 U.S. 100 (1982) 9
Roemer v. *Board of Public Works*, 426 U.S. 736 (1976) 2
St. Martin Evangelical Lutheran Church v. *South Dakota*, 451 U.S. 772 (1981) 2, 20, 22
School District v. *Ball*, 473 U.S. 373 (1985) 2, 29
Selective Service System v. *Minnesota Public Interest Research Group*, 468 U.S. 841 (1984) 27
Sherbert v. *Verner*, 374 U.S. 398 (1963) 19
Sloan v. *Lemon*, 413 U.S. 825 (1973) 2
Stone v. *Graham*, 449 U.S. 339 (1980) 25

Cases—Continued: Page

Thomas v. *Review Board*, 450 U.S. 707 (1981) 19
Tilton v. *Richardson*, 403 U.S. 672 (1971) 2
TWA v. *Hardison*, 432 U.S. 63 (1977) 2, 19
United States v. *Ballin*, 144 U.S. 1 (1892) 12
United States v. *Lee*, 455 U.S. 252 (1982) 2, 22
United States v. *O'Brien*, 391 U.S. 367 (1968) 25
United States v. *Seeger*, 380 U.S. 163 (1965) 16
Valley Forge Christian College v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) 8-9
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) 26
Wallace v. *Jaffree*, 472 U.S. 38 (1985) ..... *passim*
Walz v. *Tax Comm'n*, 397 U.S. 664 (1970) 19, 20
Widmar v. *Vincent*, 454 U.S. 263 (1981) 29
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 19
Witters v. *Washington Dep't of Services for the Blind*, No. 84-1070 (Jan. 27, 1986) 2, 19
Zorach v. *Clauson*, 343 U.S. 306 (1952) 17, 18, 20, 21, 22, 28, 30

Constitutions, statutes and rules:

U.S. Const.:
Amend. I:
(Establishment Clause) 1, 3, 14, 23, 27
(Free Exercise Clause) 19, 22, 24
Art. III 8, 9, 11-12, 13
N.J. Const.:
Art. 4, § 1 11
10 U.S.C. 7204 1
20 U.S.C. 241 1
20 U.S.C. 926 1
22 U.S.C. 2701 1
25 U.S.C. 271-304b 1
28 U.S.C. 2403 11
42 U.S.C. 1983 2
N.J. Stat. Ann. (West Supp. 1986):
§ 2A:1-10 12
§ 18A:36-4 ..... 2, 8

Statutes and rules—Continued: Page

§ 52:17A-4 11
§§ 52:17B-2 to 17B-5 11

Fed. R. App. P. 43(c)(1) 8, 10
Fed. R. Civ. P.:

25(d)(1) 10
52(a) 6

Sup. Ct. R.:

28.4(b) 11
28.4(c) 11
40.3 10

Miscellaneous:

S. Bok, *Secrets* (1982) 15
McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 18
Montaigne, *Of Solitude*, in *The Complete Works of Montaigne* (D. Frame trans. 1958) 15
Plutarch, *Concerning Talkativeness*, in VI *Plutarch's Moralia* (W.C. Helmbold trans. 1927) 15
I H.D. Thoreau, *Journal* (B. Torrey ed. 1906) 15
C. Whittier, *Silent Prayer and Meditation in World Religions* (CRS May 27, 1982) 28

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1551

ALAN J. KARCHER, ET AL., APPELLANTS

v.

JEFFREY MAY, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case concerns the constitutionality, under the Establishment Clause of the First Amendment, of a New Jersey statute that authorizes a moment of silence in public schools to enable students to engage in private contemplation or introspection. The United States is authorized to operate schools for military and foreign service dependents under certain circumstances. See 10 U.S.C. 7204 (Navy); 20 U.S.C. 241 (federal property); 20 U.S.C. 926 (Department of Defense); 22 U.S.C. 2701 (foreign service); 25 U.S.C. 271-304b (schools for Indians). The resolution of this case will bear on Congress's authority to allow periods for voluntary silent prayer or meditation in such schools. The United States also has a more general interest in the extent to which the Constitution permits government to adopt neutral and noncoercive accommodations to private religious practices.[1]

[1] The United States has participated as a party or as *amicus curiae* in numerous cases arising under the Religion Clauses of the First Amendment. See, *e.g.*, briefs filed by the United States in *Corporation of the Presiding Bishop of The Church of Jesus Christ*

STATEMENT

1. In December 1982, the New Jersey legislature enacted a statute providing for a moment of silence at the opening of the day in each of the State's public schools. The statute (N.J. Stat. Ann. § 18A:36-4 (West Supp. 1986)) states:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

The statute became effective on December 17, 1982 (J.S. App. 4a, 65a).

On January 10, 1983, appellees—a New Jersey public school teacher, several public school students, and parents of public school students—commenced this action under 42 U.S.C. 1983 in the United States District Court for the District of New Jersey, alleging that the statute is unconstitutional on its face and as applied, and seeking an injunction against its implementation. The complaint named as defendants the State Commissioner of Education, the Edison Township Board of Education,

---

of Latter Day Saints v. *Amos*, No. 86-179 (argued Mar. 31, 1987); *Hobbie v. Unemployment Appeals Comm'n*, No. 85-993 (Feb. 25, 1987); *Ansonia Board of Education* v. *Philbrook*, No. 85-495 (Nov. 17, 1986); *Bowen* v. *Roy*, No. 84-780 (June 11, 1986); *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986); *Witters* v. *Washington Dep't of Services for the Blind*, No. 84-1070 (Jan. 27, 1986); *School District* v. *Ball*, 473 U.S. 373 (1985); *Estate of Thorton* v. *Caldor, Inc.*, 472 U.S. 703 (1985); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984); *Marsh* v. *Chambers*, 463 U.S. 783 (1983); *United States* v. *Lee*, 455 U.S. 252 (1982); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); *Sloan* v. *Lemon*, 413 U.S. 825 (1973); *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); and *Tilton* v. *Richardson*, 403 U.S. 672 (1971).

and the Old Bridge Township Board of Education. J.S. App. 4a, 65a.

On January 18, 1983, the district court allowed intervention as defendants by "Alan J. Karcher in his representative capacity as Speaker of the New Jersey General Assembly, the New Jersey General Assembly, Carmen A. Orechio in his representative capacity as President of the New Jersey Senate and the New Jersey Senate" (Mot. to Dis. App. 22a). The original defendants took no active role in defending the statute; "the intervening defendants vigorously contested the action both during pretrial discovery proceedings, and at the trial itself." J.S. App. 66a; see also *id.* at 6a.

Following trial, the district court entered a declaratory judgment stating that the New Jersey statute violated the Establishment Clause of the First Amendment (J.S. App. 62a-102a). It concluded from the evidence adduced at trial (*id.* at 66a-85a) that the purpose of the statute "was to mandate a period at the start of each school day when all students would have an opportunity to engage in prayer" (*id.* at 86a). It found that the statute was promoted by persons favoring an opportunity for prayer in school, and that the statute was opposed by those who perceived the moment of silence as "an enforced religious observance" (*id.* at 87a). The court rejected the contention that the statute's purpose was "to provide a transition from non-school life to school work" (*ibid.*).

Applying the test set forth by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the district court stated that a statute is valid under the Establishment Clause if it has a secular legislative purpose, its principal or primary effect neither advances nor inhibits religion, and it does not foster an excessive government entanglement with religion (J.S. App. 89a-90a). Looking to the actions of prior New Jersey legislatures in attempting to "reintroduce a mandatory time for prayer in the public schools; the debate upon the [statute] which was in terms of public prayer and State involvement in religion; [and] the time and manner in which the minute of silence was mandated, following the form and posture of school

prayer which was outlawed in the early 1960's" (*id.* at 90a), the court found that the statute had a religious purpose.

The court also concluded that the statute "both advances and inhibits religion" (J.S. App. 94a). Religion would be inhibited, according to the district court, because some persons believe that "mandated prayer is no longer prayer," but is "drained of its substance, loses its power and becomes but an empty shell" (*id.* at 95a). In addition, those whose prayers "require movement and sound" would be prevented from engaging in their form of prayer (*id.* at 96a). Finally, the court stated that the statute requires persons "who profess no religion" to "assume a posture suggestive of particular forms of prayer" or "face public opprobrium or ridicule by asking to be excused each day" (*id.* at 97a).

The district court also concluded that the statute "fosters an excessive government entanglement with religion" (J.S. App. 98a). It found that the statute "would not involve the State in the kind of continued and pervasive monitoring of sectarian activities" condemned by this Court in *Lemon* v. *Kurtzman*, *supra*, but that the statute would "tend to promote divisiveness among and between religious groups, another form of entanglement" (J.S. App. 98a).[2]

2. The court of appeals affirmed by a divided vote (J.S. App. 1a-61a). It rejected the district court's construction of the statute as "direct[ing] that all pupils be required to engage in a silent moment" (*id.* at 9a (footnote omitted)), holding that such participation is "permissive only" (*id.* at 15a), and that students need only "refrain from interrupting the observance" (see *id.* at 21a-22a). The court of appeals also rejected the district court's conclusion that the statute would foster an excessive entanglement between government and religion by promoting divisiveness among religious groups. Ob-

---

[2] The district court declared the statute unconstitutional on its face and as applied, but entered no injunctive relief (J.S. App. 101a-102a).

serving that "any accommodation made by government to the free exercise of religion by believers is politically divisive in the sense that it offends those who believe that such accommodation is an unwarranted toleration," the court concluded that political divisiveness is not the test for finding an impermissible entanglement between government and religion (J.S. App. 17a). If the possibility of divisiveness alone were sufficient, the court noted, "no governmental accommodation of religion would survive establishment clause scrutiny" (*ibid.*).

The court of appeals next held that the statute did not have the effect of advancing or inhibiting religion. It found irrelevant the district court's observation that the statute does not accommodate the religious beliefs of persons whose prayer must be oral or otherwise self-expressive, noting that "[i]t is * * * the compulsory school attendance law, not N.J.S.A. 18A:36-4, that 'prevents other persons from engaging in their kind of prayer'" (J.S. App. 19a). The court held that the restriction upon the oral or self-expressive activities of students not wishing to participate was "valid as a legitimate time, place, and manner regulation" (*id.* at 22a).[3] It found that the state had not improperly advanced religion by setting aside a specific time for permissive silent prayer: "if accommodation to the preference of those who wish to pray silently is to be made at all, the state must be free to designate when, during the school day, such accommodation shall take place" (*ibid.*).

Finally, the court of appeals considered whether the legislature acted with a permissible purpose when it enacted the moment of silence statute. Analyzing this Court's decision in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), the court of appeals concluded that "in the abstract a statute such as N.J.S.A. 18A:36-4 would not * * * be deemed invalid under the purpose leg of *Lemon*

[3] The court stated that requiring other pupils to remain seated might not be "the only possible accommodation to the views of nonparticipants. * * * In some districts it may be possible that nonparticipating pupils leave the classroom during the exercise" (J.S. App. 22a).

v. *Kurtzman*" (J.S. App. 26a). It noted, however, that the district court had found that the legislature acted with a religious purpose. Applying the clearly erroneous standard to that finding (see Fed. R. Civ. P. 52(a)), the court of appeals upheld the district court's rejection of "the legislators' tendered secular purpose—to provide a transition from nonschool to school life" (J.S. App. 27a). It therefore "accept[ed]" the district court's finding that the legislature's purpose was religious "at least to the extent of requiring school districts to accommodate those students desiring the opportunity to engage in prayer at some point during the school day" (*id.* at 27a-28a). It emphasized that "a finding that the religious purpose was to encourage prayer over other alternatives, rather than to accommodate those wishing to pray would [not] be sustainable" (*id.* at 29a).

The court concluded that the question before it was whether the state may "take action in the school setting that, while not endorsing prayer in preference to other forms of silent activity, provides for a minute of silence for the purpose of permitting prayer by those who want to pray" (J.S. App. 29a). Stating that this Court has required a "secular purpose" to sustain statutes against an Establishment Clause challenge and that the district court had found no such purpose underlying the New Jersey statute, the court of appeals declared the statute to be unconstitutional (*id.* at 29a-30a).

Judge Becker dissented (J.S. App. 31a-60a). He stated that "a permissive, facially neutral statute such as the New Jersey moment of silence law, which has no impermissible effects and fosters an [*sic*] impermissible entanglement, carries with it a strong presumption of constitutionality which only the clearest proof of an absence of secular purpose can vitiate" (*id.* at 43a). Relying upon this Court's decision in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), Judge Becker concluded that the district court's finding of a religious purpose was subject to plenary review (J.S. App. 43a-47a).

Judge Becker carefully analyzed the evidence in the record and concluded that the evidence was not sufficient,

"separately or cumulatively, to prove an absence of any secular purpose behind the statute." He found the evidence equivocal at best, and noted that "the single unambiguous piece of evidence—the face of the statute itself—attests to the secular motives of the legislators," and in that regard was supported by parts of the testimony of the witnesses who attended the legislative hearings (J.S. App. 58a).[4]

3. The court of appeals' judgment was entered on December 24, 1985 (J.S. App. 104a-105a). On January 14, 1986, appellant Karcher was replaced as Speaker of the New Jersey General Assembly by Charles Hardwick; appellant Orechio was replaced as President of the New Jersey Senate by John Russo on the same date (Mot. to Dis. ii). In March 1986, appellants filed a notice of appeal to this Court and a jurisdictional statement. One month later, the incumbent Speaker of the New Jersey General Assembly and President of the New Jersey Senate directed appellants' counsel to withdraw the appeal to this Court (Mot. to Dis. App. 4a-5a). Appellant Karcher responded to those directives by informing his counsel that "[t]he legislative action in question was the product of the 200th Legislature and specifically was a bill which had the General Assembly as its house of origin. The 200th Legislature has an independent legal existence separate and apart from the 202nd Legislature and it is in fact that legislative body which is your client" (*id.* at 6a).

SUMMARY OF ARGUMENT

I. This appeal should be dismissed for want of jurisdiction because appellant Alan J. Karcher—the only appellant pursuing this appeal—lacks standing to invoke this Court's appellate jurisdiction. Karcher intervened in this case in his official capacity as Speaker of the New Jersey General Assembly. Shortly after the court of appeals rendered its decision in this case, Karcher was re-

[4] Judge Becker further stated that even under a deferential standard of review he would overturn the district court's conclusion that the statute lacked a secular purpose (J.S. App. 58a-60a).

placed as Speaker by Charles Hardwick; by operation of Rule 43(c)(1) of the Federal Rules of Appellate Procedure, Hardwick was "automatically substituted as a party" for Karcher. Hardwick has requested that the appeal to this Court be withdrawn. Because Karcher is no longer a party to this case, he has no standing to pursue the appeal.

II. If the Court reaches the merits, it should hold that the New Jersey statute does not violate the Establishment Clause. The statute is plainly supported by an appropriate legislative purpose under this Court's decision in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The statute simply permits a minute of silence for "quiet and private contemplation or introspection" (N.J. Stat. Ann. § 18A:36-4 (West Supp. 1986)). We find two permissible purposes based upon the language of the statute. First, the statute by its terms provides an opportunity for reflection before beginning the work of the day. Second, the statute serves the additional purpose of accommodating the religious needs of students by providing an opportunity for silent prayer. A majority of the Court indicated in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), that a moment of silence statute could be upheld against an Establishment Clause challenge, and the New Jersey statute satisfies the standard set forth in that decision.

ARGUMENT

I. APPELLANTS LACK STANDING TO MAINTAIN THIS APPEAL

Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." In order to ensure the presence of a case or controversy, Article III requires, "at an irreducible minimum, [that] the party who invokes the court's authority * * * 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge Christian College* v. *Americans United for*

Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); see also *Diamond* v. *Charles*, No. 84-1379 (Apr. 30, 1986), slip op. 6-7; *Bender* v. *Williamsport Area School Dist.*, No. 84-773 (Mar. 25, 1986), slip op. 6-8.

This Court has made clear that a party seeking to invoke a federal court's appellate jurisdiction, no less than a plaintiff seeking to invoke the jurisdiction of a federal district court, must satisfy this standing requirement imposed by Article III. See *Diamond* v. *Charles*, *supra*; *Bender* v. *Williamsport Area School Dist.*, *supra*. In our view, appellant Karcher lacks standing to invoke this Court's appellate jurisdiction, and the appeal should therefore be dismissed for want of jurisdiction.[5]

1. An action against a government officer in his official capacity "generally represent[s] only another way of pleading an action against an entity of which an officer is an agent" (*Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 690 n.55 (1978)). "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally,

---

[5] It appears from the documents filed in this Court that Karcher is the only appellant pursuing this appeal. The jurisdictional statement identifies four appellants: appellant Karcher, "the New Jersey General Assembly, Carmen A. Orechio, as President of the New Jersey Senate, and the New Jersey Senate" (J.S. ii). The incumbent Speaker of the General Assembly and President of the Senate have disavowed any interest in pursuing an appeal in this Court (Mot. to Dis. App. 4a-5a). Because the legislative bodies' interest in intervening in this action was presented through the representations of the prior Speaker and President, who asserted a right to represent the legislative bodies' views in litigation (see *id.* at 15a), these new representations appear to be sufficient to withdraw the General Assembly and the Senate as appellants before this Court. Appellant Orechio has not indicated any interest in pursuing the appeal before this Court over the objection of the current President of the Senate. Cf. *Princeton University* v. *Schmid*, 455 U.S. 100 (1982). In any event, his status is indistinguishable from that of appellant Karcher and he therefore lacks standing for the reasons discussed in the text below.

for the real party in interest is the entity." *Kentucky* v. *Graham*, 473 U.S. 159, 166 (1985) (emphasis in original; citation omitted); see also *Brandon* v. *Holt*, 469 U.S. 464, 471-473 (1985).

The district court permitted appellant Karcher to intervene as a defendant in this action "in his representative capacity as Speaker of the New Jersey General Assembly" (Mot. to Dis. App. 22a). The colloquy at the hearing at which the intervention motion was granted makes clear that Karcher intervened not as an individual, but solely in his official capacity as Speaker in order to represent the General Assembly (*id.* at 15a, 16a, 21a).[6] Because he intervened in this action as Speaker of the New Jersey General Assembly, and he no longer holds that office, Karcher is no longer a party to this litigation.

Rule 43(c)(1) of the Federal Rules of Appellate Procedure states that "[w]hen a public officer is a party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, * * * [his] successor is automatically substituted as a party. * * * An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution." The Rules of this Court and the Federal Rules of Civil Procedure each contain an essentially identical provision. See Sup. Ct. R. 40.3; Fed. R. Civ. P. 25(d)(1). On January 14, 1986, Charles Hardwick replaced Karcher as Speaker of the General Assembly; by operation of this rule of procedure Speaker Hardwick automatically was substituted for Karcher as the official-capacity party in this litigation. See *Kentucky* v. *Graham*, 473 U.S. at 166 n.11; *Brandon* v. *Holt*, 469 U.S. at 470-471. Karcher is not now a party to this action and,

---

[6] The fact that Karcher was not named as an original defendant in the complaint, but intervened as a defendant little more than a week after the complaint was filed, does not alter the fact that he appeared in the action solely in his official capacity as Speaker of the New Jersey General Assembly.

therefore, has no status that would entitle him to invoke the appellate jurisdiction of this Court. Cf. *Davis* v. *Preston*, 280 U.S. 406, 407 (1930) (citation omitted) (where a state supreme court had entered judgment against a federal officer in his official capacity, and the federal officer had been replaced by a successor, the former officer "was not then in a position to complain of the judgment or to invoke a review of it by this Court. All right and discretion to do either had passed to his successor in office").[7]

2. Karcher may assert that he has standing to appeal in his capacity as an individual state legislator. As a threshold matter, Karcher intervened in this action in his official capacity as Speaker of the New Jersey General Assembly in order to represent the General Assembly as a whole; he did not intervene as an individual legislator (see Mot. to Dis. App. 14a-16a, 22a). He may not participate in these proceedings in the latter capacity without first filing "an appropriate motion or pleading setting forth the claim or defense that he desires to assert" (*Bender* v. *Williamsport Area School Dist.*, slip op. 13 (footnote omitted)). Even if Karcher were properly before this Court in his capacity as an individual state legislator, moreover, he would have no standing to pursue this appeal.

In *Diamond* v. *Charles*, *supra*, the Court observed that "a State has standing to defend the constitutionality of its statute" (slip op. 7). A state generally asserts this interest through the actions of its Attorney General. See 28 U.S.C. 2403; Sup. Ct. R. 28.4(b), (c); N.J. Stat. Ann. §§ 52:17A-4, 52:17B-2 to 17B-5 (West Supp. 1986). Subject to any constraints imposed by Article

---

[7] Karcher appears to assert (Mot. to Dis. App. 6a-7a) that he remains a party to this litigation as a representative of the 200th New Jersey Legislature, the body that enacted the moment of silence law. But that legislative body expired in January 1984 (see N.J. Const. Art. 4, § 1, para. 3). Karcher cannot represent an entity that no longer exists.

III and state law, a state may confer this interest upon other government officials or otherwise provide for its assertion in a judicial proceeding. See, *e.g.*, N.J. Stat. Ann. § 2A: 1-10 (West Supp. 1986) (authorizing the state supreme court to "appoint counsel specially to represent any party or interest as may be deemed necessary" in an action involving the constitutionality of a statute providing for the expenditure of public funds by the state or a state instrumentality). We have not discovered any New Jersey statute conferring upon individual state legislators the right to assert the State's interest in defending the constitutionality of its statutes. In the absence of such a satutory right, Karcher cannot rely upon that interest to justify his invocation of this Court's jurisdiction.

Karcher may assert that he has standing because the decisions below invalidating the moment of silence statute "nullified" his vote in favor of the statute. To the extent such an interest is cognizable under Article III, we submit that it is an interest that may only be asserted by the New Jersey Legislature as a whole, acting through its authorized representatives. In *Diamond* v. *Charles*, *supra*, the Court observed that " 'the power to create and enforce a legal code, both civil and criminal' is one of the quintessential functions of a State. Because the State alone is entitled to create a legal code, only the State has [a] * * * 'direct stake' * * * in defending the standards embodied in that code" (slip op. 10 (citations omitted)). The power to enact a law belongs to the legislature as a whole, not to an individual legislator. Cf. *United States* v. *Ballin*, 144 U.S. 1, 7 (1892); *Field* v. *Clark*, 143 U.S. 649, 672 (1892). An individual legislator therefore has no judicially cognizable interest in defending the constitutionality of a statute. Cf. *Bender* v. *Williamsport Area School Dist.*, slip op. 9. This clear rule avoids enmeshing the judiciary in intrusive and essentially political inquiries into whether a particular member is faithfully advancing the consid-

ered views of the legislature. Cf. *Goldwater* v. *Carter*, 444 U.S. 996, 997-998 (1979) (Powell, J., concurring).[8]

Finally, Karcher does not have standing to pursue this appeal in his personal capacity. He did not seek leave in the district court to intervene in that capacity and, in any event, nothing in the record indicates that he suffered any personal injury as a result of the decisions below. *Bender* v. *Williamsport Area School Dist.*, slip op. 12-13; see also *Diamond* v. *Charles*, slip op. 12. Because Karcher lacks standing to invoke this Court's appellate jurisdiction, the appeal should be dismissed for want of jurisdiction.[9]

---

[8] *Coleman* v. *Miller*, 307 U.S. 433 (1939), is not to the contrary. The Court held in that case that 20 state senators who had voted against ratification of a constitutional amendment had standing to challenge the legality of a tie-breaking vote in favor of ratification that was cast by the lieutenant governor as presiding officer of the state senate. The Court reasoned that "these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes" (307 U.S. at 438). First, the votes of the 20 senators in *Coleman* were legally significant as a bloc, because they were sufficient to prevent ratification absent the contested vote cast by the lieutenant governor. Nothing in the record indicates that Karcher's vote in favor of the moment of silence law, standing alone, carried such significance. Second, *Coleman* dealt with standing to challenge alleged irregularities in the legislature's internal voting process, and did not address the issue of standing to defend the constitutionality of a properly enacted statute. An extension of the *Coleman* rationale to the present context would enable any legislator to intervene in any case concerning the validity or interpretation of a statute for which the legislator had voted. That broad conclusion is inconsistent with Article III. See *McRae* v. *Mathews*, 421 F. Supp. 533, 540 (E.D.N.Y. 1976), rev'd on other grounds, 448 U.S. 297 (1980).

[9] Because we conclude that Karcher has no standing to appeal to this Court, we do not address whether the two houses of the New Jersey legislature and their representatives had standing to appeal to the court of appeals. See *Bender* v. *Williamsport Area School Dist.*, *supra*. We note that the record does not appear to reflect whether the legislature's intervention was authorized by a resolution passed by the legislature. Cf. Pet. Br. at 27 n.20, *Burke* v. *Barnes*, No. 85-781 (Jan. 14, 1987). (We have provided counsel with copies of this brief.)

II. THE NEW JERSEY STATUTE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

In *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), a majority of the Court indicated that a statute providing for a moment of silence at the beginning of the school day, to be used by each individual student as he or she sees fit, would not violate the Establishment Clause. 472 U.S. at 62-63 & n.2 (Powell, J., concurring); *id.* at 70-76 (O'Connor, J., concurring in the judgment); *id.* at 85-90 (Burger, C.J., dissenting); *id.* at 90-91 (White, J., dissenting); *id.* at 113-114 (Rehnquist, J., dissenting); see also *id.* at 59 (distinguishing "[t]he legislative intent to return prayer to the public schools" from "merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday"); *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 281 (1963) (Brennan, J., concurring).

The Court in *Jaffree* (472 U.S. at 55-56) evaluated an Establishment Clause challenge to a moment of silence statute by applying the three-part test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971) (citations omitted): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" The New Jersey statute satisfies each of these requirements.

A. The New Jersey Statute Has A Valid Primary Purpose

We take as our starting point in ascertaining legislative purpose the words chosen by the legislature when it wrote the statute. On that basis we find two permissible purposes for the facially neutral New Jersey moment of silence law.[10]

---

[10] We note that a statute is invalid under the purpose prong of the *Lemon* test only if it has *no* permissible purpose. See *Wallace* v. *Jaffree*, 472 U.S. at 56 (statute must be invalidated if "it is *entirely* motivated by purpose to advance religion") (footnote

1. The courts below were no doubt correct that the purpose of a "moment of silence" statute has something to do with prayer. And we shall argue that to the extent the statute is intended to accommodate some students' desire to pray, such accommodation of religion is, by this Court's teaching, a valid purpose (see pages 18-23, *infra*). But silence also gives an occasion for reflection upon what we are about and the larger purposes of our efforts. It is the condition for recollection and contemplation. It is a mark of seriousness and solemnity.[11] The New Jersey statute's requirement of a one-minute period of silence, without any suggestion that the time be used for prayer, by its terms provides this opportunity for unrestricted and uninterrupted reflection.[12]

Since the purpose of this legislation was, most obviously and most importantly, to institute by this facially neutral statute a period for "quiet and private contemplation or introspection," the legislation itself is the primary and best evidence of its purpose. Only the most unusual circumstances should suffice to move the analysis of purpose beyond that which plausibly appears from the words which the legislature chose, in a direction which contradicts the law's seemingly permissible objective. Such an approach is consistent with this Court's

---

omitted; emphasis added); see also *id.* at 64 (Powell, J., concurring); *Lynch* v. *Donnelly*, 465 U.S. 668, 680 (1984).

[11] Plutarch, *Concerning Talkativeness*, in VI *Plutarch's Moralia* 407 (W.C. Helmbold trans. 1927); Montaigne, *Of Solitude*, in *The Complete Works of Montaigne* 177 (D. Frame trans. 1958); I H.D. Thoreau, *Journal* 64-65, 67 (B. Torrey ed. 1906); S. Bok, *Secrets* 42 (1982).

[12] One possible, specific contribution—though certainly not the only one—of a brief, silent interlude at the beginning of the school day, is to provide a "boundary" between school and non-school time, to emphasize the need for discipline and seriousness in the school context. While appellants asserted such a justification for the statute, the district court found that this was an "after-the-fact rationalization and not the real purpose of the [statute]" (J.S. App. 87a). We agree with Judge Becker that this finding must be overturned (*id.* at 56a-57a).

"reluctance to attribute unconstitutional motives to States, particularly when a plausible secular purpose for the State's program may be discovered from the face of the statute" (*Mueller* v. *Allen*, 463 U.S. 388, 394-395 (1983)).

Prayer plainly fits into this purpose to provide a moment for serious reflection and recollection. Indeed prayer is a special case, a focused variety of reflection and meditation. When religious persons look into themselves for a moment to consider what they are about to do and why, that reflection often takes the form of prayer; they share their quietest and most serious thoughts with the deity. Others may turn to different sources of duty or dedication. Cf. *United States* v. *Seeger*, 380 U.S. 163, 176 (1965). So when this Court begins its sessions with a spoken invocation, it might—to the same effect for some, but with broader meaning for others as well—begin with a moment of silence, in which we all reflect on our relation to the serious work about to begin. The several legislatures enacting moment of silence statutes like the present one have quite obviously considered it appropriate to preface the business of learning with such a brief retreat into quiet and reflection. For this reason we think this and other statutes like it are at their core quite properly general, secular and therefore unobjectionable.[13]

---

[13] Insofar as it embodies an accommodation of religious differences, the moment of silence also serves the wholesome purpose of "fostering harmony and tolerance among the pupils" (*Abington School Dist.* v. *Schempp*, 374 U.S. at 280 (Brennan, J., concurring)). Ours is a nation of great religious diversity. Schoolchildren may reveal their religious background—or lack of it—in the clothing they wear, the food they eat, or the words they utter; religious differences are not likely to be overlooked. Harmony requires, therefore, that we develop habits of mutual respect and toleration for the religious practices of others. The moment of silence provides an opportunity for young people to learn that each individual is free to worship and believe (or not believe) according to the dictates of his own conscience, and that the religious practices of others do not threaten or interfere with their own. The moment of silence is uniquely suited to such a lesson in toleration because of

Hesitation in accepting this conclusion may derive from two sources. First, prayer is often a formalized, traditional and in some communities the dominant form which reflection and meditation take. To the extent that "we are a religious people" (*Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952)), this is hardly surprising. Second, the historical origin of a desire to have such a moment of silence is undoubtedly religious in inspiration. That too, given our history, is not surprising. It is instead one of many examples in which purposes and values, religious in their origin, have become generalized beyond those particularistic origins to serve the pluralistic and secular society we have become. As Justice Frankfurter observed in *McGowan* v. *Maryland*, 366 U.S. 420, 477 (1961) (footnotes omitted) (concurring opinion):

> whatever the nature of the propulsions underlying state-enforced Sunday labor stoppage during the[] centuries before the twentieth, it is clear that its effect was the creation of an institution of Sunday as a day apart. The origins of the institution were religious, certainly, but through long-established usage it had become a part of the life of the English people. It was a day of rest not merely in a physical, hygienic sense, but in the sense of a recurrent time in the cycle of human activity when the rhythms of existence changed, a day of particular associations which came to have their own autonomous value for life.

Thus, it surely is not a vice of moment of silence statutes that their origin may be rooted in religion, or that some, perhaps many, will put the occasion offered to specifically religious purposes.

It is in this larger, more common-sense context that the New Jersey statute's purpose and effect of accommodating religion must be placed. Moment-of-silence statutes do accommodate the desire of some students to dedicate themselves to God at the beginning of the school day

---

its dual nature—as an opportunity for exercise of faith among those who believe, and a wholly secular occasion for those who do not.

as at the commencement of any serious enterprise. Silence is a fostering condition for prayer, and other occasions for it—in the hallway or cafeteria—may not be as good. And, of course, this Court has made clear that accommodation, even if it stands as a sole purpose and effect of legislation, is not for that reason deprived of the designation of secular legislation. See pages 18-23, *infra*.

But the purpose to accommodate does *not* stand alone in this legislation, any more than that purpose stands alone in statutes exempting from taxation nonprofit educational, cultural and religious institutions. The generalized purpose of such statutes is to assist institutions which foster the culture and values of the people, a project in which churches at periods in history have often played a dominant, perhaps a unique role. From the churches' point of view, as from the point of view of some legislators, such statutes are certainly an accommodation, but this should not preclude seeing them in their larger, generalized context. Thus, though we believe this statute is valid as an accommodation of religion pure and simple, as the religious exemption at issue in *Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter Day Saints* v. *Amos*, No. 86-179, is an accommodation of religion pure and simple, we suggest also that the Court not look at this statute just as accommodation pure and simple, but also in terms of the larger purpose and effect apparent from its language.

2. Even if the statute is viewed solely as an accommodation of students who wish to engage in silent, voluntary prayer, that purpose does not violate the Establishment Clause. This Court has recognized that our national traditions encourage government to act in a manner that enhances an individual's ability to observe his faith. See, *e.g.*, *Lynch* v. *Donnelly*, 465 U.S. 668, 677-678 (1984) (citations omitted); *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952); McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 14-24. It has observed that

"the Constitution * * * affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, 465 U.S. at 673; see also *Wallace* v. *Jaffree*, 472 U.S. at 81-83 (O'Connor, J., concurring in the judgment); *Thomas* v. *Review Board*, 450 U.S. 707, 726-727 (1981) (Rehnquist, J., dissenting). "[T]he interrelationship of the Religion Clauses has permitted government to take religion into account * * * to create without state involvement an atmosphere in which voluntary religious exercise may flourish." *McDaniel* v. *Paty*, 435 U.S. 618, 638-639 (1978) (Brennan, J., concurring) (footnotes omitted).

Applying this principle, the Court repeatedly has approved actions by government to ease burdens on voluntary religious observance caused by facially neutral governmental policies and practices.[14] While it serves the

---

[14] Some accommodations of religion are compelled by the Free Exercise Clause. See, *e.g.*, *Hobbie* v. *Unemployment Appeals Comm'n*, No. 85-993 (Feb. 25, 1987); *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). But the Court has made clear that government's authority to accommodate religion is not limited to the measures required by the Free Exercise Clause: "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970); see also *Bowen* v. *Roy*, No. 84-780 (June 11, 1986), slip op. 18 & n.19 (opinion of Burger, C.J.); *Wallace* v. *Jaffree*, 472 U.S. at 82 (O'Connor, J., concurring in the judgment); *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); *TWA* v. *Hardison*, 432 U.S. 63, 90 (1977) (Marshall, J., dissenting); *Gillette* v. *United States*, 401 U.S. 437, 453 (1971).

The Court has approved a variety of measures designed to enhance individuals' ability to conduct themselves in accordance with their religious beliefs without first finding such measures to be compelled by the Free Exercise Clause. See, *e.g.*, *Witters* v. *Washington Dep't of Services for the Blind*, No. 84-1070 (Jan. 26, 1986) (extension of aid under state vocational rehabilitation program to finance petitioner's theological training); *Lynch* v. *Donnelly*, *supra* (inclusion of creche in municipal Christmas display); *Marsh* v. *Chambers*,

broader purpose discussed above, a moment of silence is also an example of such a permissible accommodation of religion. Through it the State—without itself sponsoring or endorsing religion—provides an opportunity for purely voluntary private devotion in the context of a structured, compulsory state institution in which such opportunities would otherwise be nonexistent or extremely limited.[15]

The constitutionality of a statute providing for a moment of silence is most powerfully supported by this Court's holding in *Zorach* v. *Clauson*, 343 U.S. 306 (1952). There, the Court upheld a released time program that allowed students, with the permission of their parents, to leave the school grounds and go to religious centers for religious instruction. It observed that "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions" (343 U.S. at 313-314). The Court reasoned (*id.* at 313) that there are many circumstances in which public school students need special provision to enable them to exercise their religion. Ex-

---

supra (opening of legislative sessions with prayer); *Mueller* v. *Allen*, 463 U.S. 388 (1983) (tuition tax credits); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (exemption of religious school employees from unemployment taxes); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979) (implied exemption of church-operated school employees from the National Labor Relations Act); *Gillette* v. *United States*, 401 U.S. 437 (1971) (exemption of religious observers from compulsory military service); *Walz* v. *Tax Comm'n*, *supra* (property tax exemptions for religious organizations); *McGowan* v. *Maryland*, 366 U.S. 420 (1961) (Sunday closing laws); *Zorach* v. *Clauson*, *supra* (off-premises public school release time programs).

[15] It is particularly appropriate for the state to provide an opportunity for voluntary religious exercise in circumstances such as military service, prisons, or compulsory schooling, where the state has itself created a regimented environment that might—in the absence of governmental accommodation—tend to inhibit religious exercise. See *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting).

amples given were Roman Catholic mass during school hours on a Holy Day of Obligation, Jewish observances on Yom Kippur, and Protestant attendance at a family baptismal ceremony. The need for regular religious instruction and devotion, the Court found, is not different. Whether religious accommodation is made "occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act" (*ibid.*).

A moment of silence is an equally appropriate response to the religious needs of many students.[16] By providing a brief opportunity for contemplative activity at the beginning of the school day, the government merely creates an opportunity that the students may use, if they wish, for prayer—or for meditation or other quiet contemplation if they prefer. Nothing is asked of a student who wishes not to pray or meditate but that he remain silent, respecting the rights of his fellow students whose views may be different. In general, others need not even know what a person chooses to do. Even more clearly than was true in *Zorach*, then, the moment of silence puts religion on a wholly voluntary basis. It simply expands the freedom available to individuals to decide for themselves whether and how to engage in religious practice, without inducing or coercing that choice.

---

[16] It might be argued that the moment of silence is more like the on-premises released time program invalidated in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), than the off-premises program approved in *Zorach*, simply because the opportunity for religious practice here takes place physically on the public school premises. However, the constitutional flaw in the *McCollum* program was that "the classrooms were used for religious instruction and the force of the public school was used to promote that instruction" (*Zorach*, 343 U.S. at 315). Since the moment of silence is not in and of itself a religious activity (but only a moment of privacy in which a student may, if he chooses, engage in a religious activity), it does not create the concerns generated by the *McCollum* program. The classroom is not used for religious instruction or overt religious observance; thus the force of the school is in no way invoked to promote prayer.

It could be asserted that a statute providing for a moment of silence is not necessary to accommodate the religious needs of school children because, even in the absence of such a statute, a student may engage in silent prayer. While this may be true, it does not follow that the provision for a moment of silence does not "lift[] a government-imposed burden on the free exercise of religion" (*Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring in the judgment)). Though it may be possible to meditate or pray during the hustle-bustle of lunch, or on the playground, or during a lull in classroom activity, surely all contemplative activity, including prayer, is enhanced if outside distractions are momentarily stilled. Many people may be dissuaded, by those distractions or by potential embarrassment, from undertaking to pray or meditate. If all are silent, then all are free to pray or meditate as they choose, without having to appear "different." Cf. *Abington School Dist.* v. *Schempp*, 374 U.S. at 208 n.3.

Moreover, necessity is not the standard. Most forms of religious accommodation are subject to the objection that they are "unnecessary." The students involved in *Zorach* could have found time in the evening or at dawn to engage in religious instruction, without benefit of the released time program. The employees of church-operated schools in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981), could probably afford to pay unemployment taxes (cf. *United States* v. *Lee*, *supra*). There is no indication that parents in *Mueller* v. *Allen*, *supra*, could not send their children to religious schools without tax deductions. The need for a particular religious accommodation (where not required by the Free Exercise Clause) is primarily a question of public policy, for legislatures to assess. See *United States* v. *Lee*, 455 U.S. 252, 259-261 (1982); *Zorach* v. *Clauson*, 343 U.S. at 310, 314. Approximately half of the states have judged it appropriate to accommodate the religious needs of schoolchildren by providing an opportunity to pray during a formal moment of silence (see *Jaffree*, 472 U.S. at 70-71 & n.1 (O'Connor, J., con-

curring in the judgment)). Their reasons for doing so are substantial, and their action is consistent with the purpose of the Religion Clauses—to *facilitate* the free and voluntary exercise of religion, not to restrict it to an inhospitable and grudging minimum.[17]

3. Even accepting the factual findings of the courts below, the New Jersey statute would be found to have a permissible purpose. The court of appeals, reviewing the district court's finding of a "religious" purpose "to mandate a period * * * when all students would have an opportunity to engage in prayer" (J.S. App. 86a) under the clearly erroneous standard,[18] stated that it accepted the district court's finding that the legislature's purpose was religious "to the extent of requiring school districts to accommodate those students desiring the opportunity

---

[17] At one point in its opinion in *Jaffree*, the Court stated that the moment of silence statute challenged in that case could not be justified as an accommodation of religion (see 472 U.S. at 57-58 n.45). That statement did not refer to moment of silence statutes generally, but to the peculiar characteristics of the statute at issue in *Jaffree*. As the Court noted, a previously-enacted Alabama statute protected "every student's right to engage in voluntary prayer during an appropriate moment of silence during the school-day" (*id.* at 59). Because there was no secular purpose that was not "fully served by" the prior statute, the subsequently-enacted statute could not be upheld as an accommodation to religion (*ibid.*).

[18] The court below divided with respect to the standard of review to be applied to the district court's findings. Compare J.S. App. 27a-29a (applying clearly erroneous standard) with *id.* at 44a-47a (Becker, J., dissenting) (concluding that plenary review is appropriate). For the reasons that we discuss in the text below, we do not believe that the standard of review is dispositive in this case. We note, however, that regardless of the standard of review applicable to the district court's factual determinations, the district court's characterization of a statute's purpose as "religious" or "secular" is a legal conclusion subject to plenary review on appeal. In addition, the factors favoring de novo review identified by the Court in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), and *Miller* v. *Fenton*, No. 84-5786 (Dec. 3, 1985), would appear to weigh in favor of de novo review of factual findings in the Establishment Clause context as well. See *Jaffree*, 472 U.S. at 76 (O'Connor, J., concurring in the judgment).

to engage in prayer at some point during the school day" (*id.* at 27a-28a). The court of appeals further stated that "[g]iven the language of the New Jersey statute which * * * is permissive for students, and the record evidence, we do not believe a finding that the religious purpose was to encourage prayer over other alternatives, rather than to accommodate those wishing to pray, would be sustainable" (*id.* at 28a-29a).

We think the courts below failed to recognize the critical distinction between legislation removing obstacles to wholly voluntary religious observance, which is entirely permissible (see pages 18-23, *supra*), and that which endorses or promotes the practice of religion in general or of one religion in particular, which is impermissible (see *Jaffree*, 472 U.S. at 59-61). The district court's finding of a purpose to provide an "opportunity" for prayer simply demonstrates that the New Jersey statute falls within the former, permissible category.[19]

---

[19] It is instructive to compare the New Jersey statute to the Alabama statute at issue in *Jaffree*. First, Alabama had enacted a moment of silence statute prior to the adoption of the statute at issue in *Jaffree*. The second statute could not be justified as an accommodation of religion or as an educational measure because those purposes already were fully accomplished by the existing moment of silence statute. See 472 U.S. at 58-59; *id.* at 65 (Powell, J., concurring); *id.* at 77, 83-84 (O'Connor, J., concurring in the judgment). Because New Jersey had no pre-existing moment of silence statute, the statute challenged in this case *is* supported by these secular purposes. Second, the Alabama statute's legislative history indicated that the purpose of the statute was " 'to return voluntary prayer' to the public schools" (*id.* at 57 (footnote omitted)). Here, by contrast, the district court found that the legislative history of the New Jersey statute evidences an intent to accomplish the secular purpose of accommodating religion (see J.S. App. 86a).

We note in addition that the Alabama statute expressly identified "voluntary prayer" as an activity permissible during the moment of silence while the New Jersey statute does not. We do not believe that the listing of prayer as a permissible activity automatically invalidates a statute under the Establishment Clause. As Justice O'Connor has observed, "[e]ven if a statute specifies

4. More fundamentally, we disagree profoundly with the approach adopted by the district court and approved by the court of appeals, in going behind the admittedly neutral face of the statute (J.S. App. 26a) to find legislative purpose in a combination of public sentiment and the selected comments of a small handful of legislators. In our view, when a plausible[20] secular purpose is apparent from the face of the statute or even from its official legislative history, there is a strong presumption in favor of accepting it, and that presumption generally should not be subject to impeachment by evidence of the specific motives of certain legislators. See *Jaffree*, 472 U.S. at 74-75 (O'Connor, J., concurring in the judgment); *McGowan* v. *Maryland*, 366 U.S. 420, 466 (1961) (opinion of Frankfurter, J.) ("[t]o ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted"). "Inquiries into congressional motives or purposes are a hazardous matter. * * * What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for [the Court] to eschew guesswork." *United States* v. *O'Brien*, 391 U.S. 367, 383-384 (1968) (footnote omitted); see also *Everson* v. *Board of Education*, 330 U.S. 1, 6 (1947). Only in extraordinary circumstances should such evidence of motivation be found sufficient to invalidate a permissible purpose established through more conventional means.[21]

---

that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives" (472 U.S. at 73 (concurring in the judgment)).

[20] We emphasize that the purpose must be "plausible." A secular purpose that is clear on the face of the statute will not satisfy the *Lemon* test if it is a "sham." See *Jaffree*, 472 U.S. at 75 (O'Connor, J., concurring in the judgment); *id.* at 64 (Powell, J., concurring); *Stone* v. *Graham*, 449 U.S. 339 (1980) (per curiam).

[21] The Court has recognized that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into

Here, absent any finding that the facially neutral statute was applied by teachers in a way to encourage voluntary prayer (J.S. App. 26a), the district court relied substantially on the unrecorded comments[22] of Assemblyman Zangari, the principal sponsor of the bill (*id.* at 68a-71a). Zangari's cited statements suggest that he personally favored prayer in schools and had previously introduced two unsuccessful bills directed explicitly at advancing that objective. On this evidence, as well as very limited references to the views of a handful of other legislators,[23] the court concluded that "[t]he driving force behind the Bill came from those who deeply and sincerely believed that an opportunity for prayer in public schools at the beginning of each day should be mandated" (*id.* at 87a).

The court also made note of prior efforts by others to return prayer to the New Jersey schools (J.S. App. 67a), and to the opposition to the present legislation which primarily derived from hostility to any sort of prayer in

---

the workings of other branches of government. Placing a decisionmaker on the stand is therefore 'usually to be avoided'" (*Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 n.18 (1977)).

This is not to say that a statute with a facially valid purpose may never be found to violate the Establishment Clause. But it will be the rare case in which evidence of the motivations of individual legislators so extensively documents the intentions of the legislators who voted for a bill that these individual motivations may be said to represent the purpose of the legislature as a whole. Cf. *Hunter* v. *Underwood*, 471 U.S. 222 (1985); *Epperson* v. *Arkansas*, 393 U.S. 97, 108 (1968). A party seeking to overturn a statute on this basis thus bears an extremely heavy burden.

[22] Since the New Jersey legislature does not preserve an official record of its hearings and debates, the court relied on the testimony of witnesses who attended the legislative committee meetings or otherwise heard comments which the court deemed relevant (J.S. App. 68a & n.2).

[23] The evidence cited by the court refers by name to three State senators and one assemblyman (J.S. App. 70a). The very limited comments attributed to them do not include any endorsement of officially sanctioned prayer in school.

school—whether silent and voluntary or otherwise (*id.* at 71a-82a). And it rejected as "an after-the-fact rationalization" (*id.* at 87a) the assertion that the bill had a wholly secular purpose to provide, by connoting seriousness and solemnity, a period of transition from outside life to the work of the school. Its conclusion in this regard rested on testimony which it found to demonstrate "beyond any doubt whatsoever" that one minute of silence as a transitional device "has little educational value" (*id.* at 84a).

The fact that a bill's sponsor might have preferred legislation more explicitly favorable to prayer in school, but was unable to effect its passage, does not at all suggest that the neutral statute that was adopted shares the same objectionable purpose. Nor can the plain intent of a statute, borne out by the neutral manner of its application, be undermined by the fact that those opposing enactment focused on the undeniable aspect of the statute's providing an opportunity for religious observance. Their opposition on this ground does not alter the statute's provision of a genuine opportunity for reflection by all students, to be put to whatever secular or religious ends they deem appropriate. Cf. *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841, 855-856 n.15 (1984) (statements made by opponents of legislation are entitled to "little, if any weight" in construing statute). Nor does the district court's pedagogical conclusion as to the uselessness of a silent interlude between outside life and school time alter the fact that the New Jersey legislature, for reasons known only to each legislator who cast a vote, plainly reached a contrary conclusion.

This Court's decision in *Jaffree* is fully consistent with our position in this case. There, the Court's determination regarding the statute's purpose rested primarily on legislative history, the text of the statute, and the fact that "[t]he State did not present evidence of *any* secular purpose." 472 U.S. at 57 (emphasis in original).[24]

---

[24] The Court also relied upon the testimony of the sponsor of the bill that became the moment of silence statute, but that testi-

Jaffree thus turned in large part upon the absence of any plausible secular purpose, either on the face of the statute or otherwise. *Id.* at 59-60; *id.* at 66 (Powell, J., concurring); *id.* at 77-78 (O'Connor, J., concurring in the judgment). The Court did not indicate that inquiry into the motivations of individual legislators would be appropriate if the statute itself *had* evidenced a permissible purpose.

B. The Statute Does Not Have The Impermissible Effect Of Advancing Or Inhibiting Religion, Or Of Creating An Entanglement Between Church And State

The New Jersey statute, which provides for a moment of silence without prescribing how a student should use that moment, does not have any effect that this Court has identified as impermissible under the Establishment Clause. It is neutral among religions and therefore does not violate the Establishment Clause's command that "one religious denomination [not] be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); see also *Gillette* v. *United States*, 401 U.S. 437, 449 (1971); *Zorach* v. *Clauson*, 343 U.S. at 314. All major religious faiths recognize silent prayer as an acceptable form of prayer. C. Whittier, *Silent Prayer and Meditation in World Religions* 7 (Cong. Res. Serv. May 27, 1982). Whatever one's faith, a moment of silence offers an opportunity for personal devotion; yet it is offensive to no one. A better example of "accommodation of all faiths * * * and hostility toward none" (*Lynch* v. *Donnelly*, 465 U.S. at 673) would be difficult to find.[25]

---

mony simply reiterated that legislator's virtually identical statements in the legislative history.

[25] The district court found as a fact that the moment of silence instituted under New Jersey law is unsuitable for prayer by persons of some religious faiths (J.S. App. 88a), but provided no examples of religions that do not consider silent prayer as at least one acceptable mode of religious expression. Even assuming that such sects exist, the court's further conclusion that the moment of silence "prevents others from engaging in their form of prayer" (*id.* at 96a) is not correct. Adherents of such faiths, like those of

Nor does the statute promote a "symbolic union of church and state," because it does not "convey[] a message of government endorsement or disapproval of religion" (*School District* v. *Ball*, No. 83-990 (July 1, 1985), slip op. 16). As Justice O'Connor has observed, "a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise." *Jaffree*, 472 U.S. at 72 (concurring opinion); see also *id.* at 62 n.2 (Powell, J., concurring). Indeed, moments of silence are wholly neutral as between religious and nonreligious needs. Silence makes possible not only religious but nonreligious contemplation—both "prayer" and "meditation." And by the very nature of silence, the mind can be directed to wholly nontranscendental matters as well—to anything from God to homework to the girl or boy next door. Cf. *Jaffree*, 472 U.S. at 66 n.9 (Powell, J., concurring) ("[g]iven the types of subjects youthful minds are primarily concerned with, it is unlikely that many children would use a simple 'moment of silence' as a time for religious prayer. There are too many other subjects on the mind of the typical child"). Moment of silence statutes thus do not "confer any imprimatur of state approval on religious sects or practices" (*Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981)).[26]

---

no faith at all, remain free to meditate on secular subjects. Their religious liberty, even if not enhanced by the moment of silence, is in no way diminished. As the court of appeals stated in rejecting the district court's determination, "[t]he [moment of silence] statute simply does not address the problem of accommodating the beliefs of those whose prayer must be oral or otherwise self expressive. * * * It is * * * the compulsory school attendance law, not [the moment of silence statute] that 'prevents other persons from engaging in their kind of prayer'" (*id.* at 19a).

[26] The fact that some students may use the moment of silence for religious contemplation does not transform a neutral statute into government endorsement of religion. "By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the silent period." *Jaffree*, 472 U.S. at 73 (O'Connor, J., concurring in the judgment); cf. *Widmar* v. *Vincent*, 454 U.S. 263, 272 n.10 (1981) ("by creating a forum the [State]

And this statute certainly does not infringe an indivdual student's constitutional right "to select any religious faith or none at all" free from interference by government in that choice (*Jaffree*, 472 U.S. at 53).[27] "During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others." *Id.* at 72 (O'Connor, J., concurring in the judgment); *id.* at 62-63 & n.2, 66 n.9 (Powell, J., concurring); see also page 29, *supra*.

Finally, a moment of silence occasions no intrusion whatever by the state into church affairs or vice versa (cf. *Lemon* v. *Kurtzman*, 403 U.S. at 614), and thus entails no interference with "the essential autonomy of religious life" (*Marsh* v. *Chambers*, 463 U.S. at 803 (Brennan, J., dissenting)). There is no interaction between government and religious authorities and no need for inquiry into religious issues. Compare *Zorach* v. *Clauson*, 343 U.S. 308 (Court found no improper entanglement between government and religion even though school districts decided what "religious centers" would qualify for the released time programs and school officials reviewed weekly attendance reports from churches).

---

does not thereby endorse or promote any of the particular ideas aired there"); *Zorach* v. *Clauson*, 343 U.S. at 311. All that the State has "endorsed" through a moment of silence is the view that religious observances by those who choose to engage in them should, where possible, be accommodated by government. Cf. *Wallace* v. *Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring in the judgment) ("[i]n assessing the effect of [a statute that lifts a government-imposed burden upon the free exercise of religion]—that is, in determining whether the statute conveys [to an objective observer] the message of endorsement of religion or a particular religious belief—courts should assume that the 'objective observer' is acquainted with the Free Exercise Clause and the values it promotes").

[27] The Court's decisions barring the practice of spoken prayer in school rest in part on the observation that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962); see also *Abingdon School Dist.* v. *Schempp*, 374 U.S. at 223-224.

CONCLUSION

The appeal should be dismissed for want of jurisdiction. If the Court reaches the merits, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

MICHAEL CARVIN
Deputy Assistant Attorney General

ANDREW J. PINCUS
Assistant to the Solicitor General

DAVID K. FLYNN
LISA J. STARK
DENNIS J. DIMSEY
Attorneys

APRIL 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40292